

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

ABBY RIOS,

Plaintiff,

v.

WAL-MART STORES, INC,

Defendant.

Case No. 2:11-CV-1592-KJD-GWF

ORDER

Presently before the Court is Defendant's Motion for Judgment as a Matter of Law (#191). Plaintiff filed a response in opposition (#199) to which Defendant replied (#204/205).¹ Also before the Court is Plaintiff's Countermotion to Strike the Motion for JMOL (#195). Defendant filed a response in opposition (#206) to which Plaintiff replied (#207). The Court has also considered the briefing in Defendant's Motion to Stay Judgment (#187) to which Plaintiff filed a response in opposition (#194).

I. Background

Simply put, this is a slip-and-fall case involving Defendant Wal-Mart. The key issue at trial was whether Defendant had notice, actual or constructive, of a foreign substance on the floor which

¹Defendant's unopposed Motion to Withdraw (#203) the reply (#202) to the opposition filed on October 28, 2015 is hereby **GRANTED**.

1 caused Plaintiff to fall and caused her subsequent injuries. During the trial, it became clear to the
2 Court that one of the crucial issues was how long the substance had been on the floor. The Court
3 raised that issue with the parties prior to Defendant making a motion under Federal Rule of Civil
4 Procedure (“Rule”) 50(a). See Partial Transcript, Document No. 190, p. 3-11. The Court suggested
5 that a special verdict would be necessary in which the jury determined what amount of time the
6 foreign substance had been on the floor. Id. Eventually, the Court and parties settled on a special
7 verdict that asked first: “How long do you conclude the substance was on the floor?” Jury Verdict,
8 Docket No. 184, p.1, l. 13-14. That question was followed by questions on Defendant’s negligence,
9 causation of damages and the total amount of damages by category. Initially, the Court told
10 Defendants that they would have to file a motion under Rule 50(a) and mused that the Court may
11 delay ruling on the motion until it determined whether the jury’s answers on the special verdict
12 eliminated need for its consideration. Defendant did not raise the issue of its motion under Rule 50(a)
13 until after closing arguments and after the case had been submitted to the jury. See Transcript
14 (Partial) of Proceedings, Docket No. 186, p. 7-9.

15 In response to Question 1 posed by the Court on the Verdict (#184), the Jury found that the
16 foreign substance had been on the floor for only 2 minutes and 12 seconds. In response to the second
17 question, “Was defendant Wal-mart negligent?”, the Jury answered “Yes.” Now, the parties have
18 filed the present motions disputing whether sufficient evidence supports the jury’s verdict and
19 whether Defendant filed a timely Rule 50(a) motion. The Court finds that the answer to the questions
20 in its special verdict were inconsistent and the Court must vacate the Judgment in Plaintiff’s favor
21 based on the Court’s duties arising under Rule 49.

22 II. Analysis

23 A. Motions arising under Rule 49 and 50

24 Generally, the Ninth Circuit adheres, strictly, “to the requirements of Rule 50(b), which
25 prohibit a party from moving for judgment as a matter of law after the jury’s verdict unless that
26 motion was first presented at the close of evidence.” Image Tech. Servs., Inc. v. Eastman Kodak Co.,

1 125 F.3d 195, 1212 (9th Cir. 1997); see also Janes v. Wal-Mart Stores Inc., 279 F.3d 883, 887 (9th
2 Cir. 2002). If a party fails to make a motion for judgment as a matter of law (“JMOL”) under Rule
3 50(a) before the case is submitted to the jury, “a party cannot question the sufficiency of the evidence
4 . . . before the district court[.]” Cabrales v. County of Los Angeles, 864 F.2d 1454, 1459 (9th Cir.
5 1988) *vacated on other grounds by* 490 U.S. 1087 (1989).

6 However, “[w]hen a special verdict does not support a judgment a reviewing court may make
7 an exception to the Rule 50(b) requirement of a motion for a directed verdict as a prerequisite to a
8 motion for [judgment as a matter of law].” Pierce v. S. Pacific Transp. Co., 823 F.2d 1366, 1369 (9th
9 Cir. 1987). “Similarly, when a jury’s answers are irreconcilably inconsistent, a reviewing court may
10 review whether the answers support the judgment even in the absence of either a motion for directed
11 verdict or a motion for [judgment as a matter of law].” Id. “[W]hen the challenge is to the
12 consistency of the answers under a Rule 49(a) special verdict, and not to the sufficiency of the
13 evidence supporting a general verdict,” no motion under Rule 50(a) is required as a prerequisite. Id.

14 Here, Plaintiff has opposed Defendant’s motions to stay the judgment and for judgment as a
15 matter of law in addition to moving to strike the motion for judgment as a matter of law. Plaintiff is
16 certainly correct about one issue. Defendant failed to make a timely motion for directed verdict, or
17 judgment as matter of law under Rule 50(a). The mention of the issue, after closing arguments while
18 the Court discussed the labeling of exhibits to be delivered to the jury, happened after the case had
19 been submitted to the jury. “[A] motion must be made before the judge submits the case to the jury.”
20 Tortu v. Las Vegas Metro. Police Dept., 556 F.3d 1075, 1083 (9th Cir. 2009). Therefore, any motion
21 under Rule 50(b) challenging the sufficiency of the evidence is precluded.

22 However, the Court clearly anticipated that issues would arise under the Rule 49(a) special
23 verdict and told Defendant that it would have to “write it up.” The Court construes Defendant’s
24 motions as arising under Rule 49(a) as anticipated. The Court does note that Defendant consistently
25 conflates the issues and clearly believed that it also had grounds to move under Rule 50(b).

1 In this case, judgment was entered in accordance with a special verdict. The motion for
2 JMOL does allege inconsistencies in the answers given in the special verdict. “When a special
3 verdict does not support a judgment, a . . . court may make an exception to the Rule 50(b)
4 requirement of a motion for directed verdict as a prerequisite to a motion for JNOV.” Pierce, 823
5 F.2d at 1369. Further, Defendant need not have objected to the special verdict before discharge of
6 the jury to preserve its objections. See id. at 1370. Accordingly, Defendant properly filed a motion to
7 resolve the inconsistent answers. Thus, the Court denies Plaintiff’s motion to strike Defendant’s
8 motion for judgment as a matter of law.

9 B. Inconsistency between Answers to Question 1 and Question 2

10 In response to Question 1 of the Verdict, the jury concluded that the foreign substance had
11 been on the floor for two (2) minutes and twelve (12) seconds. In response to Question 2, the jury
12 responded that, “Yes”, Defendant Wal-Mart was negligent. The inconsistency between these two
13 answers is that there was no negligent act by Wal-Mart that led to the spill nor a negligent act in the 2
14 minutes and 12 seconds between the spill and Plaintiff’s fall that led to her injuries.

15 Under Nevada law, Plaintiff was required to prove the following essential elements to prevail
16 on its claim for negligence: (1) duty; (2) breach of duty; (3) causation; and (4) damages. See Perez v.
17 Las Vegas Med. Ctr., 805 P.2d 589, 590-91 (Nev. 1991). Essential to establishing that Defendant
18 breached its duty of care, Plaintiff was required to prove either: (1) that Wal-Mart created the
19 hazardous condition, or (2) than an employee or agent of Wal-Mart knew of the hazardous condition
20 prior to Plaintiff’s incident. See Eldorado Club, Inc. v. Graff, 377 P.2d 174-175 (Nev. 1962).
21 Alternatively, Plaintiff could prove constructive notice through evidence that the foreign substance
22 was on the floor for an unreasonable length of time before the incident such that Wal-Mart should
23 have known about it. See id. at 511 (“It would be grossly unfair to demand immediate awareness of
24 new peril”).

25 There is no evidence in this case from which a reasonable jury could infer that Wal-Mart had
26 either actual notice of the foreign substance or constructive notice of the substance on the floor. The

1 aisle was inspected twenty-two (22) to twenty-four (24) seconds *before* the time the jury found the
2 substance was spilled on the floor. The aisle was not swept because it was blocked by customers or
3 carts in the aisle.

4 In response, Plaintiff asserts that Wagner, the employee conducting the safety sweep, should
5 have come back to sweep the aisle in question at a later time. Even assuming that was the proper
6 procedure,² the testimony adduced at trial was that the employee had the discretion on how to sweep
7 an aisle based on customer volume, number of aisles to be swept, the time of day, amount of debris
8 and other factors. Speculation regarding what Defendant should have done or could have done, how
9 long it would take and whether it would have prevented, in a matter of seconds, Plaintiff's slip and
10 fall, does not meet her burden in establishing negligence by a preponderance of the evidence. This is
11 where the inconsistency in the juries' answers to the questions arises. Having found that the foreign
12 substance was on the floor for only 2 minutes and 12 seconds before Plaintiff fell, the jury could not
13 conclude that Wal-Mart's negligence led to her injuries without evidence that Wal-Mart knew of the
14 spill or should have known of the spill. There was simply no evidence from which the jury could
15 conclude that Wal-Mart knew or should have known of the foreign substance on the floor. Assuming
16 that Plaintiff is correct, and Wagner did not even look down the aisle, his failure to do so did not
17 cause Plaintiff's injuries, because had he looked down the aisle, he would have seen nothing, because
18 the foreign substance was not yet there.

19 Faced with this inconsistency, Plaintiff also asserts that Defendant made a judicial admission
20 during closing arguments that if the substance had been on the floor longer than two (2) minutes then
21 Defendant was liable. Defendant made no such admission. Defendant did make the argument that
22 about two minutes would have been an unreasonable time to expect them to discover the substance
23 and act upon that discovery. Defendant used the term "two minutes" generally and did not argue that
24

25 ²The Court ruled during trial that "nonadherence to sufficient policies" would not be enough to inculcate
26 Defendant. See McConnell v. Wal-Mart Stores, Inc., 995 F. Supp.2d 1164, 1169 (D. Nev. 2014). Additionally, Plaintiff
adduced no evidence of industry standards or policies.

1 longer than two minutes was negligent. To any extent that Plaintiff argues that Defendant made a
2 judicial admission, the Court disagrees.

3 Accordingly, because the answers to the questions in the verdict were inconsistent, the Court
4 concludes that the jury erred in determining that Wal-Mart was negligent. Even if the jury was
5 correct in determining that Wal-Mart was negligent, there was no evidence from which the jury could
6 conclude that the negligence caused Plaintiff's injuries. Therefore, as a matter of law, the Court
7 vacates the Judgment (#183) and directs the Clerk of the Court to enter judgment for Defendant and
8 against Plaintiff.

9 III. Conclusion

10 Accordingly, IT IS HEREBY ORDERED that Defendant's Motion to Stay Judgment (#187)
11 is **DENIED as moot**;

12 IT IS FURTHER ORDERED that Plaintiff's Motion for Attorney's Fees (#189) is **DENIED**
13 **as moot**;

14 IT IS FURTHER ORDERED that Defendant's Motion for Judgment as a Matter of Law
15 (#191) is **GRANTED**;

16 IT IS FURTHER ORDERED that Plaintiff's Countermotion to Strike (#195) is **DENIED**;

17 IT IS FURTHER ORDERED that Defendant's Motion to Withdraw (#203) is **GRANTED**;

18 IT IS FURTHER ORDERED that the Clerk of the Court **VACATE** Judgment (#183);

19 IT IS FURTHER ORDERED that the Clerk of the Court enter **JUDGMENT** for Defendant
20 and against Plaintiff.

21 DATED this 29th day of September 2016.

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24 _____
25 Kent J. Dawson
26 United States District Judge